IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/04/2004

CORAM

THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN

Second Appeal No.1581 of 1998

S. Ponnuthai .. Appellant

-Vs-

P. Muthusamy .. Respondent

PRAYER : Second Appeal against the judgment and decree in A.S. No.122 of 1995 dated 7.2.1997 on the file of the learned V Additional Judge, City Civil Court, Chennai, partly allowing the judgment and decree in O.S. No.7634 of 1992 dated 24.8.1994 on the file of the learned V Assistant Judge, City Civil Court, Chennai.

!For Appellant : Mrs. Hema Sampath for
Mr. S. Krishnasamy.

^For Respondent : Mr. T.R. Rajagopalan,
Senior Counsel for
Mr. A. Muthukrishnan.

:J U D G M E N T

Defendant in the suit is the appellant in the second appeal, having suffered concurrent judgments against her in the courts below.

2. The relationship between the parties is determined by three agreements, all dated 7.5.1989. One is an agreement of sale in which the appellant is described as the vendor and one Standard Housing Construction and Finance Company, represented by Manonmani, the wife of the respondent herein and the General Power of Attorney Chief Executive, Muthusamy, the respondent are referred to as purchasers. The next agreement is a Joint Venture Agreement in which the appellant is shown as the party of the first part and the first vendor in the above agreement, viz., the Construction and Finance Company is shown as the party of the second part. Though the party of the second part is described as a company, it is obvious from the recitals in the deed that it is a proprietory concern, the proprietrix being the wife of the respondent. The third document is a General Power of Attorney under which the appellant, the principal, has appointed the respondent Chief Executive of the Standard Housing Construction and Finance Company as her lawful attorney.

3. The appellant was allotted a plot, which is mentioned in the

plaint schedule, of an extent of 1 Ground and 1550 sq. ft. by the Tamil Nadu Housing Board. Clause 7 of the allotment order required the appellant to construct a building in the said plot within a period of three years from the date of handing over of the plot.

4. According to the plaint, as per the agreement of sale referred to above Ex.A.1, the respondent had to construct and allot 2600 sq.ft. of plinth area in the first floor of the suit schedule property. As per Ex.A.2, the joint venture deed, besides allotting the aforesaid 2 600 sq.ft., the respondent could construct and sell the remaining areas to other persons. It is stated in the plaint that the respondent had to apply to the Planning authorities and the other authorities for the required permission, sanctioned Plan, etc. and that he could not proceed fast without obtaining those permissions. According to the plaint, the respondent had put up a temporary shed to store the building materials and had also appointed a security guard right from the date of the agreement, viz. 7.5.1989. According to the plaint, Rs.5 ,00,000/- had been spent by the respondent and Rs.25,000/- had been paid towards consideration under Ex.A.1. While the respondent was acting diligently in accordance with Exs.A.1, A.2 and A.3, he received a telegram from the appellant's counsel that the Power of Attorney, Ex.A.3, was revoked on 24.2.1992 and another telegram was addressed to the respondent's wife in which it was stated that the agreement stood cancelled. According to the plaint, subsequent to the issuance of the telegram, the appellant had come to the suit property and started interfering with the respondent's right of entry and occupation and also dug a well in the property. It is also stated in the plaint that he would file a separate suit to challenge the revocation of the Power of Attorney and for specific performance. The specific cause of action for filing of the suit is, "the defendant's sending a telegram through her counsel and her subsequent interference and hindrance to the peaceful entry of the plaintiff, construction activities and so on". Therefore, the suit was filed for permanent injunction to restrain the appellant from interfering with the respondent's peaceful possession, enjoyment, right of entry and construction in respect of the property measuring one ground and 1550 sq.ft.

5. In the written statement, objections regarding the territorial jurisdiction, pecuniary jurisdiction and non-joinder of necessary party, viz. the wife of the respondent, were raised. In addition, it was stated that possession was not handed over to the purchasers, and that since the Housing Board had issued a letter dated 30.6.1992, the appellant put up a construction of an extent of 350 sq.ft. and had completed it upto the lintel level. This letter from the Housing Board is marked as Ex.B.7. The appellant denied that the respondent had applied to the authorities for permission or that he had put up the pillar foundation and appointed the security guard. The appellant denied the allegation that she and her men came to the suit property and started interfering with the plaintiff's right to use and occupation of the property. According to the appellant, since the respondent was never in possession or enjoyment of the suit property, the question of interference never arose. Therefore, it was prayed that the suit may be dismissed.

6. The trial court framed the following issues :-
i) Whether the plaintiff is entitled to the decree for permanent

injunction?
ii) Whether the Court had jurisdiction to try the suit?
iii) Whether there was breach of condition that a superstructure of 350 sq.ft. had to be put up in the site within three months from 7.5.1989?
iv) Whether the defendant is in possession of the suit property and had also put up a superstructure therein?
v) To what other reliefs?

The trial court found that it had the jurisdiction to try the suit and that the respondent was in possession and therefore was entitled to a decree.

7. On appeal, the decree was partially modified. The lower appellate court found that "the appellant had not produced any document to show that she had cancelled the agreement entered into between the plaintiff and defendant under Exs.A.1 to A.3." But, with regard to the possession of the property, the lower appellate court found that since the appellant was in possession of 350 sq.ft. where the superstructure had been put up by her, the suit ought not have been decreed in its entirety. A Commissioner who was appointed pending the appeal found that nine pits were seen with pre-foundation work. From this, the lower appellate court came to the conclusion that "the plaintiff had started construction in the suit property and he could not have done so had he not been given possession" and therefore, the decree of the trial suit was set aside with regard to 350 sq.ft. which was found to be in the appellant's possession and confirmed with regard to the remaining area. Against this, the present second appeal has been filed. The respondent has not filed any appeal against the decree dismissing his suit for injunction in respect of 350 sq.ft.

8. The following substantial questions of law were raised :-
"(i) Whether a mere agreement holder, the plaintiff is entitled for a decree of injunction as prayed for in the plaint as against the real owner, the defendant when especially, the agreement of sale Ex.A1, Joint Venture agreement Ex.A2 and the Power of Attorney Ex.A3 were duly cancelled by sending a telegram Ex.A16 and by executing a registered revocation deed Ex.B6 by the real owner, namely the defendant?

(ii) Whether the Courts below are correct in holding that the City Civil Court has got territorial and pecuniary jurisdiction to entertain the suit filed by the plaintiff?

(iii)Whether the Judgment and decrees of the Courts below are sustainable when the findings were arrived at due to misconception of oral and documentary evidences?"

9. Learned counsel for the appellant would submit that it is clear even from the agreements and the description of the property that the trial court did not have the jurisdiction, either pecuniary or territorial, to try the suit. It is submitted that the plaintiff was not entitled to sue without impleading his wife. Learned counsel would also submit that the conclusion drawn by both the courts below with regard to possession had absolutely no basis since there was neither oral nor documentary evidence to

support this conclusion and for this reason, learned counsel would pray that the second appeal may be allowed.

10. Learned counsel referred to the decisions in Multichannel (India) Ltd. vs. Kavitalaya Productions Private Limited [A.I.R. 1999 Madras 59], Syed Basha vs. Doraikannu [1999 (1) M.L.J. 433], Srinivasa Battachariar vs. Paramasivam [1999 (3) M.L.J. 47], Balasubramaniam K.S. vs. S. Munuswamy [2000 (2) C.T.C. 417] and Kasthuri vs. Baskaran [2004 (1) M.L.J. 175] to show that when there is an efficacious remedy, the suit for injunction will not lie and that no order of injunction can be given. It was also pointed out that though in the plaint it was stated that a suit would be filed for cancellation of the agreement, revocation of the Power of Attorney and for specific performance, no such suit has been filed till date. There cannot be a permanent fetter on the true owner's rights. It was also pointed out that Section 38 of the Specific Relief Act, which deals with the circumstances under which a perpetual injunction can be granted as also Section 41, would clearly show that an injunction of this nature cannot be granted. Section 73 of the Contract Act, which deals with the consequences of breach of contract, was also referred to in order to show that at best, the respondent would be entitled to compensation and nothing more.

11. Learned senior counsel for the respondent, on the other hand, would submit that the respondent is entitled to protect his possession by virtue of Section 53-A of the Transfer of Property Act since he had been put in possession pursuant to an agreement in writing and he having performed his part of the contract. The various documents marked on behalf of the respondent were referred to and it was submitted that it is only on a consideration of all these documents that the courts below came to the conclusion that the respondent was in possession and therefore, this finding cannot be interfered with. In support of his submissions, learned senior counsel referred to the decisions in Shrimant Shamrao Suryavanshi vs. Pralhad Bhairobe [2002 (3) L. W. 211 (SC)] and Sugumaran P.S. vs. Ragini @ Usha [2001 (3) L.W. 321] to show that Section 53-A of the Transfer of Property Act can be relied on by the respondent to protect his possession and that even if a suit for specific performance is time barred, the protection of Section 53-A is not lost.

12. In order to succeed in a suit for injunction, the plaintiff must prove that he was in possession of the property and that there was interference. Further, since injunction is an equitable remedy, the plaintiff should also show that he is entitled to equity. The trial court, on a consideration of the various doc uments marked by the respondent, viz., Exs.A.5 to A.22, which were letters written to the Tamil Nadu Housing Board, receipts issued by the Chennai Metropolitan Development Authority, proceedings of the Ambattur Municipality, agreements with one Meena Gurusamy and one

Chandra, in order to show that he was in possession of the property. The agreements which were marked as Exs.A.1 to A.3 contain the following recitals :-

Ex.A.1 : "6. The VENDOR has, this day of the agreement, delivered

the vacant possession of the Schedule mentioned property to the purchaser in part performance of this agreement of sale."

Ex.A.2 : "1. The FIRST PARTNER hereby on this day of this Deed of Joint Venture hands over the possession of the Schedule mentioned property to the joint Venture."
"5. The Second Partner undertake to construct the proposed storeyed flats strictly according to the specifications contained in the Annexure hereto."

Ex.A.3 : "2. To take possession of the Schedule mentioned property and demarcate, delineate the same in accordance with the plan attached hereunder. To enter agreement to sell undivided share of the schedule property in any manner my attorney feel."

Nowhere in the plaint is it pleaded that pursuant to Exs.A.1 to A.3, the plaintiff was put in possession of the property. It must be remembered that in Ex.A.1, the respondent's wife is also a party, but she has not been made a party in the suit. In Ex.A.2, which is the Joint Venture, the respondent is not a party, but only his wife. Ex.A.3, of course, is in favour of the respondent. Only the following phrases in the plaint would indicate that the plaintiff is in occupation of the property :-
"Subsequent to the issue of the telegram, the defendant, with her men, came to the suit Schedule property and started interfering with the plaintiff's right of entry and occupation over the same. Unless the defendant is restrained ..... from interfering with the plaintiff' s peaceful possession."

Paragraph 9 of the plaint, which deals with the cause of action, does not state that on 7.5.1989, the plaintiff was put in possession.

13. As against this, the defendant has clearly stated that no possession was handed over on 7.5.1989. In the oral evidence, P.W.1 had stated in his cross-examination as follows :-
"v1 Kjy; 3 mf;hpbkz;l; vGjpagpd; bghd;Dj;jhap vd;ida[k; vd; kidtpiaa[k; miHj;Jg; ngha; Plot?ia fhz;gpf;ftpy;iy/ 1 thuk; fHpj;J mth; Kd; dpiyapy; g{i$ nghl;L RthjPdk; vLj;Jf; bfhz;nld;/"

Therefore, it is his own admission that he was not put in possession on the date of Exs.A.1 to A.3 and that he took possession only after one week. If he had not taken possession on the date of Exs.A.1 to A.3, it is his duty to prove his possession, which he claims to have taken after one week.

14. P.W.2 is the husband of one Meena Gurusamy, with whom the respondent had entered into the agreement, Ex.A.14. In the chiefexamination, he had deposed that when he went to see the suit property, the respondent's watchman was there, but in the cross-examination, he has stated that he does not know who the watchman is nor that he had ascertained where Standard Housing is situated, after seeing the watchman. Therefore, the evidence of P.W.2 does not help the respondent. P.W.3 is a watchman who claims to be working as a watchman for three years in Muthusamy's place. His evidence is

recorded in the year 1994 . He refers to a small house in the suit property in which a family is living. In his evidence, he states that this property was constructed by the respondent, "me;j fl;olj;ij thjpjhd; fl;odhh;/" This is the construction of 350 sq.ft. which is referred to in the judgments of the courts below. Whereas, the respondent himself, in his evidence, had stated, "350 sq.ft.-f;fhd fl;olj;jpy; bghd;Dj;jhap tPL Kjypy; fl;ltpy;iy/" Therefore, it is not even the case of the respondent that he put up the building of an extent of 350 sq.ft. Hence, it is difficult to rely on the evidence of P.W.3.

15. D.W.1, the appellant, has clearly stated that it was nearly 7'o clock in the night when the agreements were signed and that she did not hand over possession of the property to the respondent or his wife. D.W.1 has not been asked whether the respondent took possession one week after the agreement after performing the pooja. Therefore, there is no evidence to show when the respondent took possession of the property. It is, no doubt, true that the agreement speaks of handing over possession. But, even as per his own admission, P.W.1 did not take possession of the property on the date of Exs.A.1 to A.3, but only subsequently. When it is the plaintiff's own admission that he was not put in possession on 7.5.1989, the recitals in Exs.A.1 to A.3 regarding possession cannot help him.

16. Next, we come to the alleged threat of interference with his possession. It is the case of the respondent that after seeing the telegram, the appellant, with her men, came to interfere with his right of entry into the property. No date is given regarding the interference or the threat of interference. Even in the cause of action paragraph, the respondent has not given any date on which the appellant is said to have interfered or hindered his possession or his ingress or egress to the property. In her written statement, the appellant has denied the allegation of interference. A ccording to her, there was no such interference and in any event, the respondent was not in possession of the property and therefore, the question of interference with his possession did not arise.

17. Now, if we look at the respondent's evidence, the threat of interference falls to the ground. This is what he has to say even in his chief-examination :-

"bghd;Dj;jha; vd;id J}f;fp vwpag; nghtjhf bra;jp fpilj;jjhy; jhd; , e;j tHf;if bra;fpnwd;/"

This evidence is vague and does not prove the pleadings. Therefore, the respondent has not established the cause of action for filing the suit.

18. It is the respondent's case that he is in possession of 1 Ground and 1550 sq.ft. Whereas, it is clear from the trial court's judgment as well as the judgment of the lower appellate court that the appellant had put up a superstructure with regard to 350 sq.ft. Therefore, the factual finding is that the respondent was not in possession of 350 sq.ft. The respondent's case can succeed only if he is in possession of the entire 1 Ground and 1550 sq.ft. This must be pleaded and proved. We have seen that

the pleading is unsatisfactory, as also the proof. It is found that the respondent was never in possession of 350 sq.ft. of the suit property and his case that he was put in possession is also not borne out by oral or documentary evidence. The respondent has not filed any application for amending his plaint to recover possession of 350 sq.ft. It is his case that he was put in possession of the entire extent of property and therefore, he must explain how the appellant continued in possession of a portion of the said property, and had also put up a house. The clear proof of the appellant's possession of 350 sq.ft. demolishes the case of the respondent.

19. The non-joinder of his wife is another circumstance which casts a doubt on the case of the respondent. If the respondent was really in possession of the property pursuant to the above documents, then his wife, to whom possession is allegedly given under Exs.A.1 and A.2, should have been made a party or she should at least have given evidence. The decisions on Section 53-A of the Transfer of Property Act cannot protect the respondent since the sine qua non for taking shelter under Section 53-A is proof of possession, which is absent.

20. The judgment in Multichannel (India) Ltd. vs. Kavitalaya Productions Private Limited [A.I.R. 1999 Madras 59] dealt with a decree for interim injunction and therefore, it may not really apply to the facts of this case where we are dealing with a decree for permanent injunction, but one observation therein would support the case of the appellant. An injunction will not be granted where the plaintiff has a remedy by way of damages. Syed Basha vs. Doraikannu [1999 (I) M.L.J. 433] was a case where the plaintiff was put in possession pursuant to an agreement and he filed a suit for specific performance nine years later. It was held therein that continuance of possession will not entitle him to the relief of injunction. In Srinivasa Battachariar vs. Paramasivam [1999 (III) M.L.J. 47], the plaintiff was the appellant before this Court. He filed a suit for bare injunction. In that case, this Court declined to give the plaintiff the benefit of Section 53-A on the ground that it can be used only as a shield and not as a sword so as to protect possession and that since he is in unlawful possession of the property, he cannot get the relief of permanent injunction against the true owner. It was observed, "In the absence of any material to show that the plaintiff got possession from the lawful owner at any rate, the present position of the plaintiff can be equated only as a trespasser."

21. In this case, there is no material to show that the plaintiff got possession of the suit property. All the exhibits marked to show that applications were made to statutory authorities and which were strongly relied on by the trial court can, at best, show that the respondent was acting as the Power of Attorney of the appellant. Those documents cannot, in any way, prove possession. The decision in Balasubramaniam K.S. vs. S. Munuswamy [2000 (II) C.T.C. 417] also dealt with interim injunction, but the learned Judge therein pointed out that injunction cannot be granted in view of Section 41(h) of the Specific Relief Act when an equally efficacious relief can be obtained by other mode. The decision in Kasthuri vs. Baskaran [2004 (I) M.L. J. 175] is also to the same effect that where there is an equally efficacious relief, suit for injunction will not lie.

22. In Patel Natwarlal Rupji vs. Shri Kondh Group Kheti Vishayak [19 96 (1) L.W. 368], it was observed as follows :
"Transfer of Property Act, S.53-A - Right of a transferee to retain possession as a sheild and not as a sword - Person who pleads equity must come to court with clean hands to claim to be entitled to the section - It merely operates as a bar to the plaintiff to assert his title.

S.53-A confers no title on the transferee but imposes a statutory bar on the transferor to seek possession from the transferee - Equally it does not confer title on defendant in possession nor can he maintain a suit on title.

Agreement, held, was brought into - existence to defeat the right of respondents to proceed against the property, and hence petitioner was not a genuine transferee but a privy to the fraud, and his alleged possession was a ruse to protect the rights of the judgment debtor, etc. - Statutory right of part performance cannot be therefore used for the declaration sought for in the suit."

In Jasmer Singh vs. Kanwaljit Singh [A.I.R. 1991 Punjab & Haryana 194], it was held as follows :
"Specific Relief Act (1963), S.41 - Suit for permanent injunction - Relief sought for restraining vendors from alienating suit property - Plaintiff vendee having efficacious remedy by way of suit for specific performance, suit for permanent injunction - Not maintainable."

In Rajendra Kumar vs. Mahendra Kumar Mittal [A.I.R. 1992 Allahabad 35], it was held as follows :
"Civil P.C. (5 of 1908), O.39, Rr.1, 2 - Specific Relief Act (47 of 1963), S.41(b) - Suit for injunction restraining opposite parties from alienating property - Property alleged to have been purchased by plaintiff under agreement - Equally efficacious relief can be obtained in suit for specific performance of contract - Injunction cannot be granted."

In Krishnamoorthy Koundar vs. Paramasiva Koundar [A.I.R. 1981 Madras 310], a Division Bench of this Court held that a prospective vendee in possession of property cannot be granted temporary injunction in a suit for specific performance in the same agreement.

23. The decisions referred to on behalf of the respondent will not help. In fact, those decisions would go against the respondent because one of the conditions to be satisfied is proof of possession. Normally, the findings of fact in suits for bare injunction are not interfered with in second appeal. But in this case, it is apparent that even the pleadings do not make out proof of possession or proof of interference with possession, so the suit must fail. The Lower Appellate Court holds that no document has been produced to show that Exs.A.1 to A.3 have been cancelled and unless and until they are cancelled, the respondent's possession cannot be disturbed. The averments in the plaint have been lost sight of, wherein the respondent admits the revocation of Ex.A.3 and that "Another telegram addressed to the plaintiff's wife by the defendant's counsel wherein it is mentioned that the agreement

dated 7.5.1989 is lapsed....." The Lower Appellate Court has concluded that since Ex.C.1, the Commissioner's Report (appointed pending appeal), speaks of foundation work in 9 out of 10 pits, the respondent must have taken possession of. This conclusion is erroneous. The pillars found in the property in the year 1996 are not proof of possession on the date of the suit (20.8.1992). The categorical admission by the respondent that he was not put in possession on the date of Exs.A.1 to A.3 was ignored. The effect of the continuance of the possession of the appellant at least with regard to 350 sq.ft. was ignored. The total absence in the oral evidence with regard to threat or interference was also ignored. Conclusions not based on pleadings or legal evidence cannot be confirmed.

24. In the above circumstances, the questions of law raised by the appellant with regard to misconstruction of the oral and documentary evidence must be answered in the appellant's favour. The second appeal is accordingly allowed. No costs. Consequently, C.M.P. No.15536 of 1998 is closed.

Index : Yes
Website : Yes

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To

The Registrar,
City Civil Court,
Chennai.